**B. Actions for Tax Refunds.**

With the exception of its treatment of declaratory judgments, the Court has not addressed the relationship of any particular form of noninjunctive relief to the jurisdictional ban contained in §1341. Because one element of the damages claimed by Petitioners is measured by the amount of taxes overpaid, the district court below characterized this action as a suit for refund and concluded, on the basis of *Kelly* v. *Springett,* 527 F.2d 1090 (9th Cir. 1975) and *Bland* v. *McHann,* 463 F.2d 21 (5th Cir. 1972), that the action should therefore be barred in that such actions "would cause disruption of the states' revenue collection systems equal to that caused by anticipatory relief." *Fair Assessment in Real Estate Association* v. *McNary,* 478 F. Supp. 1231, 1233-34 (E.D. Mo. 1979), *aff'd,* 622 F.2d 415 (8th Cir. 1980), Pet. App. A-7.

The court in *Bland,* basing its decision largely on a construction of the statute as a broad restriction on any exercise of federal jurisdiction that might affect state tax administration, of which "an action for tax refund is an integral part," barred a tax refund claim that was ancillary to a prayer for injunctive relief. *Bland* v. *McHann,* 463 F.2d at 27, *cited in Kelly* v. *Springett,* 527 F.2d at 1094. *Accord, United Gas Pipe Line Co.* v. *Whitman,* 595 F.2d 323 (5th Cir. 1979); *Robinson Protective Alarm Co.* v. *City of Philadelphia,* 581 F.2d 371, 373 n.5 (3d Cir. 1978) (tax refund ancillary to prayer for injunctive relief); *O'Brien* v. *Dreyfus,* 493 F. Supp. 476 (E.D. Wis. 1980) (nominal tax refund action praying for declaratory relief).

Treatment of tax refund actions by the lower federal courts, however, has been divided. Some courts have found the inapplicability of §1341 to refund actions to be so self-evident that extensive discussion was not required. *Southland Mall, Inc.* v. *Garner,* 293 F. Supp. 1370 (W.D. Tenn. 1968). *Accord, Louisville & Nashville Railroad Co.* v. *Atkins,* 390 F. Supp. 576 (M.D. Tenn.), *aff'd,* 423 U.S. 802 (1975). *See also Matthews,* 284 U.S. at 525-26.

Arguably, the Court has considered and, without comment, rejected the applicability of the Tax Injunction Act to actions for tax refunds. In *Ott* v. *Mississippi Valley Barge Lines*, 336 U.S. 169 (1949), the Court examined the merits of a federal court action for the recovery of state taxes paid under protests premised upon the unconstitutionality of the taxes. The Court declined to erect §1341 as a bar to consideration of the merits. In view of the Court's "ever present duty . . . to satisfy itself that it is acting within the scope of jurisdiction conferred upon it by law," it may be assumed that the Court concluded that tax refund actions are not barred. *Central Steel & Wire Co.* v. *City of Detroit*, 101 F. Supp. 470, 471 (E.D. Mich. 1951) (citation omitted). *See also Rico Argentine Mining Co.* v. *Board of County Commissioners*, 215 F. Supp. 208 (D. Colo. 1963).

In any event, whether the Tax Injunction Act embraces refund actions remains an unsettled question. If anything, the Court has manifested tacit acceptance of the exercise of federal jurisdiction over such claims notwithstanding the possibility that the Act bars jurisdiction. However, even if the Court had conclusively determined to the contrary, that is, that tax refund actions are prohibited, resolution of that question would not dispose of Petitioners' action. This is not a tax refund case. The characterization of it as a tax refund case by the district court below is erroneous. In addition to the amount of taxes overpaid, Petitioners claimed both compensatory damages for expenses incurred in seeking relief and punitive damages. J.A. 10, 13-14. Moreover, Petitioners' action is not, as would be a refund action, directed against the public treasury; Petitioners seek to recover damages from Respondents as individuals.

**C. Actions for Damages.**

Actions for damages may overlap with refund actions, but they are not coterminous. In the context of the Tax Injunction Act bar, the significant distinction is that an action for a tax refund may be "an integral part of state tax administration," as

declared in *Bland* v. *McHann*, 463 F.2d at 27, and thus a part of the tax system into which the district courts arguably must avoid any intrusion. In no sense, however, is an action for damages, like that of Petitioners, an integral part of state tax administration. It is not difficult to comprehend that entertaining a refund action might unreasonably draw a federal court into the thick of a state tax administration plan and, arguably, may be banned. But an action for damages is necesarily outside that system.

Implicitly recognizing that actions for damages fall outside the tax administration system, several courts have instead premised their refusal to consider actions for damages on the potential result that the threat of liability would chill tax collection efforts. *A Bonding Co.* v. *Sunnuck*, 629 F.2d 1127, 1133 (5th Cir. 1980); *Advertiser Co.* v. *Wallace*, 446 F. Supp. 677, 680 (M.D. Ala. 1978). Another court equated the finding necessary for recovery of damages in a civil rights action with a declaratory judgment, which it assumed was barred by the Act. *Evangelical Catholic Communion, Inc.* v. *Thomas*, 373 F. Supp. 1342, 1344 (D. Vt. 1973).

The Seventh Circuit, after a thoughtful analysis of the legislative and judicial history of the Tax Injunction Act, rejected the proposition that an action for damages arising from the unconstitutional conduct of state tax officials would necessarily disrupt a state taxing process. *Fulton Market Cold Storage Co.* v. *Cullerton*, 582 F.2d 1071. *See also Ludwin* v. *City of Cambridge*, 529 F.2d 606 (1st Cir. 1979). Unlike injunctions and declaratory judgments, damage actions do not address the validity of ongoing policy or conduct, but only the consequences of conduct that has terminated:

> Fulton is seeking damages for the alleged wrongful and intentional conduct of certain officials who allegedly deprived Fulton of constitutional rights while acting under color of state law. Fulton seeks relief which is retrospective, i.e., *compensation for harm done*, unlike equitable relief which is anticipatory or prospective. *Fulton Market*, 582 F.2d at 1078 (emphasis supplied).

Nor does entertainment of a suit for damages premised on violations of clearly established constitutional rights require the federal court to determine matters more properly within the province of state courts. *Id.; see Ludwin* v. *City of Cambridge,* 592 F.2d at 610. Where a complaint alleges violations of established constitutional rights, or actual malice, the district court's determination of liability requires only that it examine the facts relating to each individual tax official, as to whether there was sufficient personal involvement and malice to sustain a claim against him under §1983.

> Additionally, the outcome of the present suit does not pivot upon the construction of some state statute or tax regulation which should more properly be construed by appropriate state courts. The issue is not whether a state statute is constitutionally valid but rather whether an official's conduct violated established constitutional standards. *Fulton Market,* 582 F.2d at 1078.

That narrow scrutiny in no way injects the federal court into any policymaking that is comparable to injunctions or declaratory judgments. The mere fact that those individuals whose conduct is examined happen to wear the cloaks of tax officials should not be sufficient to deprive the federal court of jurisdiction over the damage claims. To so hold would defeat the purposes of §1983.

**D. Significance of §1983 Damages Actions.**

The Court should not overlook the significance of §1983 in considering whether to prohibit damage actions. The Court has repeatedly confirmed the importance of the damage remedy under that law as a " 'vital component of any scheme for vindicating cherished constitutional guarantees.' " *Gomez* v. *Toledo,* 446 U.S. 635, 639, *quoting Owen* v. *City of Independence,* 445 U.S. 622, 651 (1980). At the same time, it is true that the general societal interest in integrity of the state

treasury is so vital that it may override the conflicting interests of individuals. Thus, the Act seeks to prohibit interruptions to the free flow of revenue into state coffers. Yet, even that interest must at times yield to a superior competing interest.

For example, despite the absolute statutory ban on the issuance of injunctions, federal courts may enjoin state tax collection, without regard to the existence of a state remedy, in cases where there is a substantial federal interest. In *Department of Employment* v. *United States,* 385 U.S. 355, 358 (1966), the Court made clear that the Tax Injunction Act does not bar the United States from seeking injunctions against state efforts to impose taxes on the federal government or its instrumentalities. Even where the United States is not itself a party to an action, but merely could be, a private party may sue to enjoin the collection of state taxes, notwithstanding the Act. *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976). *See also United States* v. *Dorgan,* 522 F.2d 969 (8th Cir. 1975), *on remand,* 413 F. Supp. 173 (D.N.D.), *aff'd,* 429 U.S. 953 (1976), where a private government contractor was able to so associate itself with the United States that it was able to elude the Tax Injunction Act bar.

Thus, not only is the Tax Injunction Act limited to suits for injuctive relief; it does not even bar such relief in all suits. Petitioners here do not suggest that a §1983 claim is of sufficient import to surmount the bar against injunctions. Injunctions are of no concern here. But, if the strong protection afforded the state can be penetrated to permit some injunctions, the Act should not shield past conduct of tax officials, particularly when weighed against the substantial federal interest in vindicating constitutional rights through §1983 actions.

**E. Limitations of the Act to Equity.**

A finding that an action for damages such as Petitioners' is barred by the Tax Injunction would be out of step with every

prior decision of the Court treating federal court deference to state tax administration or the construction of the Act. From *Great Lakes* to *Rosewell*, the Court has uniformly described the controlling considerations exclusively in terms of equity jurisdiction and anticipatory litigation.

Thus, in explaining the special treatment of such tax matters by the federal courts, the Court in *Lynch* v. *Household Finance Co.*, 405 U.S. 538 (1972), stated that the Court has "repeatedly barred *anticipatory federal adjudication* of the validity of state tax laws." *Id.* at 543 n.6 (emphasis supplied).

Again, in *Tully* v. *Griffin*, 429 U.S. 68 (1976), Justice Stewart confirmed that the

> congressional command of 28 U.S.C. §1341[ is] that *no injunction* may issue against the collection of a state tax where state law provides a "plain, speedy and efficient remedy." As the Court frequently had occasion to note, the statute has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of the State to administer its own fiscal operations. 429 U.S. at 73 (emphasis added).

Most recently, the Court reiterated that in enacting the Tax Injunction Act,

> Congress . . . legislated to solve an existing problem by *cutting back* federal equity jurisdiction. *Rosewell* v. *LaSalle National Bank*, ____ U.S. at ____, 101 S. Ct. at 1235 (emphasis in original).

In contrast, the Court has never intimated that the Tax Injunction Act might apply to bar actions at law for damages.

Because of the Tax Injunction Act's exclusively equitable concern, Petitioners' action for damages simply does not fit within its bar. Petitioners seek no injunction or declaratory judgment. Petitioners seek only redress of injuries arising out of

Respondents' conduct. That conduct about which Petitioners have complained is past conduct that violated clearly established constitutional rights and that was done with malice.

Petitioners did not invite the district court to determine the correctness of the tax assessments at issue; because of Petitioners' previously established constitutional rights, correctness of the assessments is not in issue. Likewise, Petitioners did not solicit any determination that would prescribe a particular solution that Respondents must employ to remedy unequal assessments. All that the district court was asked to determine was whether the various Respondents had in fact engaged in the injurious conduct with the requisite knowledge and intent. A positive finding on that question would compel liability. That kind of contact between the federal courts and state tax officials does not fall within the restrictions of the Act. The Act does not deprive Petitioners of the right to an action for damages in federal court.

## V. The Purposes Of The Tax Injunction Act Are Fulfilled Without Stretching The Act To Bar Actions For Damages.

Contrary to the conclusion of the courts that have barred actions for damages under §1341, a federal court's award of damages against state taxing officials premised upon malice or violations of clearly established rights will not, like an injunction, halt state tax administration. Those courts focused narrowly upon application of the Act to forestall such disruption. However, in reality, their concern about impact falls within the broader concern that an award of damages against *any* public official by *any* court may inhibit the proper functioning of government. The underlying fear is that the prospect of personal liability may cause public officials to adopt such excessive caution in their decisionmaking that they will cease to make and enforce laws, resulting in paralysis of government or, alternatively, that public officials will surrender the independence of their decisionmaking to the demands of the litigators. *E.g.*, the

instant case below, *Fair Assessment in Real Estate Association* v. *McNary*, 478 F. Supp. 1231, 1233-34 (E.D. Mo. 1979), *aff'd*, 622 F.2d 415 (8th Cir. 1980); *Advertiser Co.* v. *Wallace*, 446 F. Supp. 677, 680 (M.D. Ala. 1978).

The Court need not apply the Tax Injunction Act to actions for damages in order to protect state tax administration from unwarranted disruption caused by the intervention of federal courts. Adequate protection of state interests, including tax administration, already exists in the form of common law immunity. Immunity aims to avert the danger of inhibiting public officials from performing their responsibilities "with the decisiveness and judgment required by the public good" that would result from subjecting them to personal liability for injuries resulting from their official conduct. *Scheuer* v. *Rhodes*, 416 U.S. 232, 240 (1974).

One policy consideration pervades all analysis of immunity: The public interest requires that public officials freely make decisions and enforce laws. *Id.* at 241. In order to prevent interference with the effective operation of government, immunity interposes a barrier to personal liability for mistakes made in office:

> Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all. *Id. at 241-42, quoted in Wood* v. *Strickland*, 420 U.S. 308, 321 (1975).

Error on the part of public officials is tolerated as a cost of conducting government; except in limited circumstances,

deliberate mistreatment of citizens is not. As a result, only limited classes of public officials have absolute immunity from personal liability under federal law. *See Lake Country Estates* v. *Tahoe Planning Agency,* 440 U.S. 391 (1979) (regional legislators); *Imbler* v. *Pachtman,* 424 U.S. 409 (1976) (public prosecutors); *Pierson* v. *Ray,* 386 U.S. 547 (1967) (judges); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951) (state legislators). Other classes of public officials—for example, prison officials, *Procunier* v. *Navarette,* 434 U.S. 555 (1978); governors and other state executive officers, *Scheuer* v. *Rhodes,* 416 U.S. 232; public school board members, *Wood* v. *Strickland,* 420 U.S. 308; police officers, *Pierson* v. *Ray,* 386 U.S. 547—have only qualified immunity. Public tax officials have a qualified immunity. *See Sunday Lake Iron Co.* v. *Wakefield Township,* 247 U.S. 350, 353 (1918).

For public officials entitled to qualified immunity, that is, those who are not judges, prosecutors, or legislators, official conduct is immune from liability under federal statutes only when undertaken in good faith "on the basis of an objectively reasonable belief that those acts were lawful." *Gomez* v. *Toledo,* 446 U.S. 635, 639 (1980).

Conversely, the only conduct undertaken in an official capacity for which a public official like a tax official faces exposure to personal liability is bad faith conduct—for example, conduct that is malicious, willful, invidious, intentional, and knowing or in violation of established constitutional rights. *See Wood* v. *Strickland,* 420 U.S. at 321-22. Necessarily then, the only conduct that can lead to personal liability for damages, without application of the Tax Injunction Act, is that bad faith conduct. The public good does not require the expansion of the Tax Injunction Act in order to protect such conduct. There is no public interest in protecting such conduct. To the contrary, as Justice White noted in his concurring opinion in *Imbler* v. *Pachtman,* the public interset lies in deterrence of such conduct:

> [O]rdinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which §1983 was enacted. 424 U.S. at 442.

That the public interset lies in deterrence of such conduct was recently acknowledged by the Court:

> "Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize §1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's raisons d'etre." *Owen* v. *City of Independence,* 445 U.S. 622, 656 (1980), *quoting* Note, *Developments in the Law: Section 1983 and Federalism,* 90 Harv. L. Rev. 1133, 1224 (1977).

Petitioners' case falls within the narrow bad faith exception to the broad immunity generally accorded public officials: their Complaint alleges not only that Respondents knowingly acted in derogation of Petitioners' clear constitutional entitlement under *Sioux City Bridge Co.* v. *Dakota County,* 260 U.S. 441 (1923), *Breckenridge Hotels Corp.* v. *Leachman,* 571 S.W.2d 251 (Mo. 1978) (*en banc*), and other authorities to assessment of their property at the same rate as the property of other taxpayers, but also, that Respondents maliciously intended to do so. Under any applicable test, that conduct is bad faith conduct and, therefore, excepted from immunity. It cannot be seriously contended that such conduct requires protection in order to further state tax administration. The Court cannot extend the Act's shield to preclude all damage actions merely in order to protect that sort of conduct, without grossly distorting the purposes of the Act.

The Tax Injunction Act is not needed to protect good faith conduct of state tax officials against personal liability; it is not desirable to protect their bad faith conduct; it should not be applied to bar Petitioners' action.

The Court need not inflate the Tax Injunction Act beyond its plain import in order to protect the legitmate activities of state taxing authorities. The Court should not do so. That is not the Court's proper role. Even if federal actions for damages did have undesirable effects on state tax administration, modification of the scope of the Act's bar is for Congress, not the Court, to decide. As the Court has repeatedly declared,

> It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system. . . . The choices fall in the legislative domain. *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 476 n.28 (1978), *quoting Baltimore Contractors* v. *Bodinger,* 348 U.S. 176, 181-82 (1955).

Thus the Court can only construe the Tax Injunction Act as it exists, not as the Court or others might like it to be. That jurisdictional bar does not apply to actions for damages and does not preclude Petitioners' action.

## CONCLUSION

For the reasons stated above, Petitioners respectfully request that the Court reverse and vacate the order of the Court of Appeals for the Eighth Circuit and direct that court to remand the matter to the district court for trial on the merits.

Respectfully submitted,

David J. Newburger
Susan Spiegel
Steve Vossmeyer
James P. Gamble
Newburger & Vossmeyer
393 North Euclid, Suite 300
St. Louis, Missouri 63108
314/361-2555

Attorneys for Petitioners

Office-Supreme Court, U.S.
FILED
JUN 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-427

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., J. DAVID CASSILLY, and LYNN F. CASSILLY,
*Petitioners,*

v.

GENE McNARY, WILLIAM A. SKAGGS, EDMUND J. PUNG, CHARLES T. SCHNEIDER, FRANK J. ANTONIO, DONALD G. WILLIAMS, TOM R. OTTO, and STEPHEN C. SNYDER,
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

## BRIEF FOR RESPONDENTS McNARY, SKAGGS, ANTONIO, PUNG and SCHNEIDER

THOMAS W. WEHRLE
COUNTY COUNSELOR
ANDREW J. MINARDI
ASSOCIATE COUNTY COUNSELOR
KAREN C. MOCULESKI
ASSISTANT COUNTY COUNSELOR
TIMOTHY L. GROSCH
ASSISTANT COUNTY COUNSELOR
County Government Center
Clayton, Missouri 63105
889-2042

*Attorneys for Respondents McNary, Skaggs, Antonio, Pung and Schneider*

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

## QUESTION PRESENTED

Whether the District Court erred in dismissing this action on grounds that the Tax Injunction Act, 28 U.S.C. Section 1341, bars a suit at law for damages under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Section 1983 arising from Respondents' alleged past discriminatory practices in assessing Petitioners' property and in taxing Petitioners.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Table of Contents | iii |
| Table of Authorities | iv |
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Statutory and Constitutional Provisions Involved | 2 |
| Statement of the Case | 3 |
| Summary of Argument | 6 |
| Argument | |
| I. The district court properly recognized that Petitioners' action brought pursuant to 42 U.S.C. § 1983 does not void the prohibition of the Tax Injunction Act | 10 |
| II. The language of the Tax Injunction Act is sufficiently broad to bar actions for damages | 11 |
| III. The legislative history of the Tax Injunction Act and the historic case law development establish that Petitioners' action for damages is barred by the Act | 13 |
| IV. The weight of judicial authority has interpreted the Tax Injunction Act as a bar to Petitioners' action for damages | 20 |
| V. Barring an action for damages is within the broad purposes of the Tax Injunction Act | 30 |
| Conclusion | 32 |
| Appendix | A-1 |

## TABLE OF AUTHORITIES

**Cases:**

Advertiser Co. v. Wallace, 446 F. Supp. 677 (M.D. Ala. 1978) ..... 25,26

Aluminum Co. of American v. the Department of the Treasury of the State of Michigan, 522 F. 2d 1120 (6th Cir. 1975) ..... 21

American Commuters Association v. Levitt, 405 F.2d 1148 (2nd Cir. 1969) ..... 10

Bland v. McHann, 463 F.2d 21 (5th Cir. 1972) *cert. denied,* 410 U.S. 977 (1973) .....23,24,25

Breckenridge Hotels Corp. v. Leachman, 571 SW2d 251 (Mo banc 1978) ..... 29

Bull v. United States, 295 U.S. 247 (1935) ..... 13

Carter v. Stanton, 405 U.S. 669 (1972) ..... 28

Central Steel & Wire Co. v. City of Detroit, 99 F. Supp. 639 (E.D. Mich 1951) ..... 21

Coon v. Teasdale, 567 F.2d 820 (8th Cir. 1977) ..... 10,21

Evangelical Catholic Communion, Inc. v. Thomas, 373 F. Supp. 1342 (D. Vt. 1973) ..... 25,26

Ex Parte Young, 209 U.S. 123 (1908) ..... 14

Fair Assessment in Real Estate Association, Inc. v. McNary, 478 F. Supp. 1231 (E.D. Mo. 1979), *aff'd,* 622 F. 2d 415 (8th Cir. 1980) .....23,25,28,29,30

First National Bank of Greeley v. Board of Commissioners, 264 U.S. 450 (1924) ..... 24

Ford Motor Credit Company v. Louisiana Tax Commission, 440 F. 2d 675 (5th Cir. 1971) ..... 21

Fulton Market Cold Storage Co. v. Cullerton, 582 F.2d 1071 (7th Cir. 1978) *cert. denied*, 439 U.S. 1171 (1979) ..... 21,25,27

Gomez v. Toledo, 446 U.S. 635 (1980) ..... 28

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) ..... 22,24,29

Green v. Klinkofe, 422 F. Supp. 1021 (N.D. Ind. 1976) . 21

Hague v. CIO, 307 U.S. 496 (1939) ..... 19

Hickmann v. Wujick, 488 F. 2d 875 (2nd Cir. 1973) .... 10,26

Horn v. O'Cheskey, 378 F.Supp. 1280 (D.N.M. 1974) .. 26

Huffman v. Pursue Ltd., 420 U.S. 592 (1975) ..... 28

Kelly v. Springett, 527 F.2d 1090 (9th Cir. 1975) ..... 23,24,25

Kistner v. Milliken, 432 F. Supp. 1001 (E.D. Mich 1977) 21

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) ..... 13

Louisville & Nashville Railroad Co. v. Atkins, 390 F. Supp. 576 (M.D. Tenn. 1975), *aff'd*, 423 U.S. 802 (1975) ..... 21

Ludwin v. City of Cambridge, 592 F. 2d 606 (1st Cir. 1979) ..... 21,25,26

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) ..... 10,13,31

Mandel v. Hutchinson, 494 F.2d 364 (9th Cir. 1974) .... 10

Matthews v. Rodgers, 284 U.S. 521 (1932) ..... 13,20,24,31

Miller v. Bauer, 517 F.2d 27 (7th Cir. 1975) ..... 10

Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) ..... 19

Monroe v. Pape, 365 U.S. 167 (1961) ..... 28

Natural Gas Pipe Line Company of American v. Sergeant, 337 F. Supp. 88 (D. Kans., 1972) ..... 25

O'Brien v. Dreyfus, 493 F. Supp. 476 (E.D. Wis. 1980) . 25

Ott. v. Mississippi Valley Barge Line, Co., 336 U.S. 169 1949) ..... 21

Owen v. City of Independence, 445 U.S. 622 (1980) .... 28

Pennsylvania R. Co. v. International Coal Min. Co., 230 U.S. 184 (1912) ..... 23

Perez v. Ledesma, 401 U.S. 82 (1971) .....13,14,31

Rico Argentine Mining Co. v. Board of County Commissioners, 215 F. Supp. 208 (D. Colo. 1963) ..... 21

River Wear Com'rs v. Adamson, LR 2 AC 743 (1877) .. 11

Robinson Protective Alarm Co. v. City of Philadelphia, 581 F 2d 371 (3rd Cir. 1978) ..... 25

Rosewell v. LaSalle National Bank, ____ U.S. ____, 101 S.Ct. 1221 (1981) .....8,12,13,14,24,29

Southland Mall, Inc. v. Garner, 293 F. Supp. 1370 (W. D.Tenn. 1968) ..... 21

Tully v. Griffin, Inc., 429 U.S. 68 (1976).....13,20,29

United Gas Pipe Line Co. v. Whitman, 595 F. 2d 323 (5th Cir. 1979) ..... 20,25

United States v. Menasche, 348 U.S. 528 (1955) ..... 11

United States v. State Tax Commission of the State of Mississippi, 505 F2d 633 (5th Cir., 1974) ..... 25

Wells v. Malloy, 510 F.2d 74 (2nd Cir. 1975) ..... 10

Wilwording v. Swenson, Warden, 404 U.S. 249 (1971).. 28

**Constitutions and Statutes**

United States Constitution, Amendment XIV Section 1 . 2

28 U.S.C. §1341 .....2,5,6,7,8,11,12,19,23,25,27,28,29,30

28 U.S.C. §1342 ..... 2,16

42 U.S.C. §1983 .....3,6,8,10,18,19,23,24,26,28,31

**Other Authorities**

Note, A Federal Forum for Broad Constitutional Deprivation by Property Tax Assessment, 65 Cal. L. Rev. 823 (1977) ..... 18

Note, The Tax Injunction Act and Monetary Relief, 46 U. Chi. L. Rev. 736 (1979) ..... 18

Comment, The Civil Rights Acts and Mr. Monroe, 49 Cal. L. Rev. 1945 (1961) ..... 19

Sen Rep. No. 1035, 75th Cong., 1st Sess. (1937) ..... 15,17

H.R. Rep. No. 1503, 75th Cong., 1st Sess. (1937) ..... 15

H.R. Rep. No. 1194, 73d Cong., 2d Sess. (1934) ..... 16

81 Cong. Rec. 1415 (Feb. 19, 1937).....14,16,17,18

78 Cong. Rec. 2021 (Feb. 6, 1934) ..... 19

Webster's Third International Dictionary (15th ed.) (1969) ..... 12

# No. 80-427

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

---

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., J. DAVID CASSILLY, and LYNN F. CASSILLY,

*Petitioners,*

v.

GENE McNARY, WILLIAM A. SKAGGS, EDMUND J. PUNG, CHARLES T. SCHNEIDER, FRANK J. ANTONIO, DONALD G. WILLIAMS, TOM R. OTTO, and STEPHEN C. SNYDER,

*Respondents.*

---

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

## BRIEF FOR RESPONDENTS McNARY, SKAGGS, ANTONIO, PUNG and SCHNEIDER

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 622 F.2d 415, Pet. App. A-1 to A-2. The opinion of the United States District Court for the Eastern District of Missouri is reported at 478 F.Supp. 1231, Pet. App. A-3 to A-9.

### JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit, *en banc,* was entered on June 19, 1980, affirming the judgment of the United States District Court for the

Eastern District of Missouri, entered on November 7, 1979. The final mandate of the United States Court of Appeals for the Eighth Circuit was entered on July 15, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The Petition for Writ of Certiorari was filed on September 17, 1980 and granted on April 6, 1981.

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

**United States Constitution, Amendment XIV, Section 1:** No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**28 U.S.C. §1341:** The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

**28 U.S.C. §1342:** The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

**42 U.S.C. §1983:** Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the proper proceeding for redress.

§ 137.115(1) R.S.Mo. 1978 (App. A, *infra*, p. A - 1)

§ 137.385 R.S.Mo. 1978 (App. A, *infra*, p. A - 1)

§ 137.430 R.S.Mo. 1978 (App. A, *infra*, p. A - 1)

§ 139.031 R.S.Mo. 1978 (App. A, *infra*, p. A - 2)

§ 536.100 R.S.Mo. 1978 (App. A, *infra*, p. A - 3)

§ 536.140(6) R.S.Mo. 1978 (App. A, *infra*, p. A - 3)

## STATEMENT OF THE CASE

### Preliminary Statement

Petitioners' Statement of the Case is repleat with conclusions and allegations not contained within the record before this court and should be disregarded. It should also be noted that this case comes to the court on Respondents' Motion to Dismiss, and therefore, the Statement of the Case must be extracted from the unproven allegations of Petitioners' Complaint.

Petitioners brought an action for actual and punitive damages to remedy the alleged deprivation of Petitioners' rights under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983. Joint Appendix, A, 4, (hereinafter refer-

red to as "J.A.____"). The individual Petitioners, J. David Cassilly and Lynn F. Cassilly, are owners of real property with newly constructed improvements (hereinafter referred to as a "new home") located in St. Louis County, Missouri. Petitioner Fair Assessment In Real Estate, Inc. (hereinafter referred to as "FAIR") is a not-for-profit membership corporation formed by real estate taxpayers in St. Louis County to promote equitable enforcement of real property tax laws in the State of Missouri. J.A. 4,5. Respondents are various past and present officials of St. Louis County and the Missouri State Tax Commission entrusted with responsibility for enforcement of real property tax laws. J.A. 5. Respondent Gene McNary is the County Executive of St. Louis County (formerly "County Supervisor"), Respondents William A. Skaggs and Edmund J. Pung are present and past Directors of Revenue of St. Louis County; Respondents Charles T. Schneider and Frank J. Antonio are present and past Tax Assessors of St. Louis County; Respondents Donald G. Williams, Stephen C. Snyder, and Tom R. Otto are present and past members of the Missouri State Tax Commission. J.A. 5. Petitioners alleged that Respondents have enforced property tax laws to the damage of Petitioners and other owners of new homes. J.A. 3 & 4. According to Petitioners' allegations, Respondents have assessed new homes at a higher rate than old homes and have singled out such owners who have previously protested such disparity for property tax reassessment. J. A. 8,9,10,11,12.

Individual Petitioners, the Cassillys, sought money damages in the amount of a refund which Petitioners claim would be due if Petitioners were assessed at the alleged county-wide average rate of assessment and for punitive damages. J. A. 10,12,13. Petitioner FAIR sought money damages for expenses it allegedly incurred in the course of its efforts to obtain enforcement of state real property laws for the benefit of its members. J. A. 13.

Petitioners filed this action in the District Court for the Eastern District of Missouri, Eastern Division, on July 2, 1979.

On August 13, 1979, Respondents Gene McNary, William A. Skaggs, Edmund J. Pung, Charles T. Schneider and Frank J. Antonio, filed their joint Motion to Dismiss Petitioners' Complaint for failure to state a claim for which relief may be granted and for lack of jurisdiction over the subject matter. On August 10, 1979, Respondents Donald G. Williams, Thomas R. Otto, and Stephen C. Snyder, filed an Answer generally denying the allegations in Petitioners' Complaint.

After considering the pleadings, suggestions and memoranda filed by the various parties, and without the introduction of evidence or oral argument, the district court entered its order on November 7, 1979 dismissing this action in its "entirety," on the basis of the Tax Injunction Act, 28 U.S.C. §1341 and doctrines of federal abstention and comity considerations. Petition for Certiorari, Appendix A-3 to A-9 (hereinafter referred to as "Pet.App.____").

All Petitioners, the Cassillys and FAIR were therefore dismissed. Pet.App. A-8 to A-9. All Petitioners appealed to the Eighth Circuit Court of Appeals.

Thereafter, on June 19, 1980, upon consideration of the briefs and oral arguments of the parties, the Eighth Circuit, en banc, entered its order affirming the district court judgment but issued no opinion. Pet.App. A-1 to A-2.

Although, individual Petitioners and Petitioner Fair made application for a writ of certiorari, both Petitioners and Respondents have briefed only the issues regarding individual Petitioners, the Cassillys.

## SUMMARY OF ARGUMENT

### I

Individual Petitioners, the Cassillys, alleged that various local and state tax officials (Respondents) acting under color of state law and in their individual capacities, have violated Petitioners' right to Equal Protection and Due Process of law under the Fourteenth Amendment to the United States Constitution in the assessment of the Cassillys' home. Petitioner FAIR alleged that it incurred certain expenses in the course of its efforts to obtain enforcement of state real property tax laws on behalf of its members. FAIR's members were alleged to be real estate taxpayers. Individual Petitioners sought money damages in the amount of a refund which individual Petitioners claim would be due if Petitioners were assessed at the alleged average rate of assessment and for punitive damages. FAIR sought money damages in the amount of expenses incurred in the course of its efforts to obtain enforcement of state real property tax laws.

Because Petitioners' action is a claim for a refund due to an alleged overassessment, the district court was correct in dismissing Petitioners' action on the grounds that the Tax Injunction Act, 28 USC §1341, as well as the doctrine of abstention and comity provisions embodied therein, bars this action. Specific statutory bars to Federal court jurisdiction will prevail over a claim brought pursuant to 42 USC §1983, such as Petitioners'.

### II

The purpose of statutory interpretation is to ascertain the intent of the legislature. No one aspect of the several criteria used in that interpretation is determinative of intent, but rather each of several elements must be weighed and summed together to arrive at the proper interpretation of the language used to express that intent. The starting point in that determination is the language itself. The language used in §1341 admits of a bar to

federal court jurisdiction for any action which "suspends or restrains" state tax process, as well as to actions which "enjoin" those same matters. Thus, the language of the statute is sufficiently broad to bar Petitioners' action for damages.

III

As an aide to statutory construction, the legislative history and legal/historical context are persuasive in reaching the conclusion that the purpose of the enactment of §1341 was to defer to the states in matters of state taxation. This purpose is consistent with principles of federalism and comity which were given expression in several cases which preceded the enactment of §1341.

Similarly important as an aid to statutory construction is the contemporaneous case law at the time of enactment of §1341. An examination of that case law reveals that prior to the enactment of §1341 there was a complete absence of federal cases of a non-equity nature dealing with state taxation matters. The absence of non-equity cases explains the preoccupation with equitable actions expressed in the legislative history. Further, despite this preoccupation, there are even stronger threads running throughout the legislative history of deference to the states in taxation matters and of concern for the fiscal integrity of those states. These stronger threads amply support the conclusion that Congress in enacting §1341 intended to bar all federal actions dealing with state taxation issues, regardless of the nature of the action.

Petitioners' characterization of their action as one of law, as opposed to equity, does not vaporize the congressional intent, embodied in §1341, to defer to the state in this area of primary state concern. An action at law is barred for the same reasons as one in equity.

## IV

The Court in *Rosewell* v. *LaSalle National Bank*, ____ U.S. ____, 101 S.Ct. 1221 (1981), pointedly refused to confine the purpose and intent of §1341 to bar only equitable actions. The Act has its "roots in equity" but its purpose and intent are to preserve the fiscal integrity of the states through a bar to federal jurisdiction in state taxation matters.

Judicial interpretation of the Tax Injunction Act by the lower courts is instructive. The circuits have consistently held that the Tax Injunction Act bars declaratory judgment actions. Likewise, the circuits which have considered the issue have been consistent in their treatment of "refund actions" where the jurisdictional bar of the Tax Injunction Act has been raised.

There exists no logical basis on which to treat actions at law differently from "refund actions", as actions at law would be as disruptive to the assessment, levy and collection of taxes as those nominally termed "equitable actions." The lawyer's pen, like an artist's brush, can paint an action as "equitable" or "legal" to fit the canvas of a taxpayer's complaint. Federal court entertainment of state tax actions at law will necessarily entangle the courts in the administration of the taxation system and allow Petitioners to do indirectly what Petitioners are conclusively barred from attempting through an equitable action.

The mere fact that Petitioners have brought their action under 42 USC §1983 does not magically remove the bar to jurisdiction of the Tax Injunction Act. This court has concluded that mere invocation of 42 USC §1983 does not extinguish specific legislative bars to federal court jurisdiction. By the very nature of a §1983 complaint, there exists no requirement of an exhaustion of administrative or state remedies. Thus, without the statutory bar of the Tax Injunction Act, a damage action could be brought by disgruntled taxpayers prior to any attempt by the taxpayer to contest the validity of the tax in the appellate procedure provided under state law. As a practical matter, the

orderly process of the collection of taxes will be disrupted if the taxpayer is permitted to avoid the remedies provided by state law.

Barring an action for damages in federal court under the Tax Injunction Act does not lead to the result that Petitioners will be prevented from vindicating federal constitutional rights, as Petitioners urge. The Tax Injunction Act bars federal court jurisdiction only where "a plain, speedy and efficient remedy may be had in the courts of such state." Thus, Petitioners are not prevented by the Tax Injunction Act from pursuing their action in state court with ultimate review to this court.

V

Allowing an action for damages will defeat the broad purpose of the Tax Injunction Act - to prevent the interference of federal courts in state taxation matters. A damage action, no less than an action in equity, will call into question the complex methods and procedures utilized in the collection, levy and assessment of taxes by taxing officials. Petitioners' recitation of the law of qualified immunity enjoyed by public officials in the administration of the state tax system is irrelevant. Damage actions against individual officials who are carrying out the policies of the taxing instrumentality are actions against the instrumentality itself. What damages are awarded will no doubt come from the coffers of the taxing instrumentality, particularly as the nature of those damages is a "refund" for overcollection of taxes.

If the Tax Injunction Act is held not to bar actions such as Petitioners', the potential exists for §1983 actions to be initiated in federal court prior to any contest of taxes in the forums provided under state law. Thus, state taxing officials would be required to defend their procedures and methods in the first instance in the federal courts, and those courts would be necessarily interfering with the legitimate interests of the states in implementing their own taxation systems. Such a result would clearly thwart the expressed intent of Congress in enacting the Tax Injunction Act.

## ARGUMENT

### I. The District Court Properly Recognized That Petitoners' Action Brought Pursuant To 42 U.S.C. §1983 Does Not Avoid The Prohibition Of The Tax Injunction Act.

Petitioners' dissertation on the elements required to state a claim under 42 U.S.C. §1983 under point 1 avoids the very question before the court which is whether the Tax Injunction Act bars such an action in the first instance. If the court holds that the damage action is so barred, whether or not the elements averred by Petitioners state a claim under §1983 is irrelevant.

The court has held that merely stating a claim under 42 U.S.C. §1983 does not extinguish specific legislative bars to federal court jurisdiction. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 542 n. 6 (1972). The circuits which have considered whether the Tax Injunction Act bars claims under §1983 for injunctive and similar relief have consistently held that such an action is so barred. *Hickmann* v. *Wujick*, 488 F.2d 875 (2nd Cir. 1973); *Miller* v. *Bauer*, 517 F2d 27 (7th Cir. 1975), *Wells* v. *Malloy*, 510 F2d 74 (2nd Cir. 1975); *Coon* v. *Teasdale*, 567 F.2d 820 (8th Cir. 1977); *Mandel* v. *Hutchinson*, 494 F2d 364 (9th Cir. 1974); *American Commuters Association* v. *Levitt*, 405 F.2d 1148 (2nd Cir. 1969).

Hence, the mere statement of a cause of action otherwise cognizable under §1983, will not lie because of the specific statutory bar of the Tax Injunction Act.

It is thus helpful to first explore the nature of the "damages" requested by Petitioners before examining the language, legislative history, and underlying purpose of the Tax Injunction Act. Individual Petitioners, the Cassillys, sought money damages in the amount of a refund which individual Petitioners claim would be due if their property were assessed at the alleged average rate of assessment and for punitive damages. Petitioner FAIR sought money damages in the amount of expenses incur-

red in the course of its efforts to obtain enforcement of state real property taxes. Petitioners' action is a claim for refund due to an alleged overassessment. Upon careful analysis of the Tax Injunction Act, Petitioners' action is patently within the purpose of the jurisdictional bar of the Act.

**II. The Language Of The Tax Injunction Act Is Sufficiently Broad To Bar Actions For Damages.**

The primary consideration in the interpretation of a statute is to determine the intent of the legislature. This maxim was given full expression by Lord Blackburn in 1877:

> "In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view, for the meaning of the word varies according to the circumstances with respect to which they were used." *River Wear Com'rs* v. *Adamson,* LR 2AC 743 (1877)

The words used in the statute alone are not determinative of intent, but may logically be used as a starting point. Section 1341 provides as follows:

> "The district court shall not enjoin, *suspend or restrain* the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state." 28 U.S.C. Section 1341 (emphasis supplied).

Patently, the words of the statute contemplated the barring of actions other than injunctions as the words "suspend or restrain" must be given some meaning. *United States* v. *Menasche* 348 U.S. 528 (1955). If the intent of the legislature

was, as Petitioners urge, purely to bar injunctive relief, the remaining words would be superfluous. Meaning must be accorded the words "suspend or restrain".

The word "enjoin" is a word of art in the legal lexicon and has specific meaning. However, the words "suspend" and "restrain" enjoy only their common meanings. According to the 1969 edition of Webster's Third International Dictionary the word "suspend" means "to debar, or cause to withdraw temporarily from any privilege, office of function, to cause to stop for a time; to set aside or make temporarily inoperative." The word "restrain" means "to hold back from some action, procedure or course, to limit or restrict to or in respect to a particular action of course; to moderate or limit the force, effect, development, or full exercise of; to keep from being manifested or performed." Webster's Third International Dictionary (15th ed.) 2303, 1936 (1969).

Thus, the implication of the words "suspend or restrain" is much broader than to merely "enjoin". "Restrain" includes not only actions that are anticipatory in their effect but also actions which "restrict, moderate or limit", which implies a bar to all actions that have those ill-effects on the administration of state tax matters.

In light of this analysis, Petitioners' contention that specific statutory language barring damage actions would be expected is ill-founded. Petitioners' citation to *Rosewell* v. *LaSalle National Bank*, ___ U.S. ___, 101 S. Ct. 1221, 1234 (1981) for that proposition is clearly inapposite. In fact, the Court in *Rosewell* v. *LaSalle National Bank, supra,* at 1234, specifically found that "the statute's broad prophylactic language is incompatible" with the carving out of exceptions urged therein. Hence, a bar to damage actions is consistent with the language used in §1341.

Abiding by Blackburn's formulation, the circumstances which led to the enactment of the statute should be examined to aid in the determination of legislative intent. As important as

the legislative history is the legal posture of cases touching on matter of state taxation considered by federal courts prior to and contemporaneous with the enactment of the Tax Injunction Act, which cases Congress is presumed to have been aware of.

**III. The Legislative History Of The Tax Injunction Act And The Historic Case Law Development Establishes That Petitioners' Action For Damages Is Barred By That Act.**

The court most recently in *Rosewell* v. *LaSalle National Bank*, ____ U.S. ____, 101 S.Ct. 1221 (1981) extensively examined the legislative history of the Tax Injunction Act in its analysis of the meaning of the words "plain, speedy and efficient remedy" used in the statute. Petitioners have also cited at great length certain statements made in the Senate and House prior to the enactment of what ultimately became §1341. This legislative history must be placed within a larger historical perspective of the traditional deference to the states in the administration of their own fiscal operations. *Tully* v. *Griffin, Inc.*, 429 U.S. 68 (1976); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Lehnhausen* v. *Lake Shore Auto Parts, Co.*, 410 U.S. 356 (1973); *Bull* v. *United States*, 295 U.S. 247 (1935); *Matthews* v. *Rodgers*, 284 U.S. 521 (1932); *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972).

As stated by the Court in *Lynch* v. *Household Finance Corp., supra*, "Congress has treated judicial interference with the enactment of state tax laws as a subject governed by unique considerations and has restricted federal jurisdiction accordingly. . ." 538 n. 6.

A similar concern with protecting state tax administration matters from federal interference is echoed in the legislative history of the Act. The history indicates that the Act was in response to several serious problems arising from federal court jurisdiction over state tax disputes. Congress was concerned with the discriminatory treatment of state residents attempting

to dispute state and local taxes.[1] Congress was especially disturbed by the fact that:

> "The existing practice of the Federal courts to entertain tax-injunction suits makes it possible for foreign corporations to withhold from a State and its governmental subdivisions taxes in such vast amounts and for such long periods as to disrupt State and county finances, and thus make it possible for such corporations to determine for themselves the amount of taxes they will pay." 81 Cong. Rec. 1415, 1416 (Feb. 19, 1937).

Finally, the Act also was indicative of Congressional hostility to the increased exposure of state officials to suits for injunctive relief resulting from the court's opinion in *Ex parte Young*, 209 U.S. 123 (1908). See *Rosewell* v. *LaSalle National Bank*, ____ U.S. ____, 101 S.Ct. 1221, 1233, at n.28 (1981); *Perez* v. *Ledesma*, 401 U.S. 82, 115 (1971) (Brennan, J., concurring in part and dissenting in part).

It would be a mistake, however, to dwell on any single problem referred to in the legislative history, as Petitioners in their Brief for this Court have done, and construe the resolution of that problem as the sole motivation of Congress in passing the Tax Injunction Act. The problems are diverse and there is no indication in the legislative history that Congress intended to narrow the scope of the Act to apply solely or primarily to any one of them. Nor does the language of the Act lend itself to such a restrictive interpretation. The Act goes beyond being a mere response to *Ex parte Young, supra,* as it limits the jurisdiciton of federal courts to hear suits against counties and municipalities, as well as against states, which entities had never been subject to the protections of the Eleventh Amendment to the U.S. Constitution. If Congress had been solely concerned

---

[1] Sen. Rep. 1035, 75th Cong. 1st Sess. (1937).

with the discriminatory treatment of state residents it could have merely limited the ability of federal courts to hear state tax cases where jurisdiction was based solely upon the ground of diversity of citizenship. Similarly, if Congress had been moved to pass the Act solely in order to deny foreign corporations the opportunity to litigate state tax issues concurrently in state and federal courts, the Act as passed was overbroad. Finally, the language of the Act expresses broader concerns than just the tying up of state revenues during periods of litigation in federal courts. As none of the problems discussed in the legislative history alone account for the language and scope of the Act, it would appear that Congress intended a broader purpose for the Act. As each of the problems discussed were of concern to Congress, it would appear that Congress intended to deal with their common source — federal court jurisdiction over state tax disputes. It would also appear that it sought to resolve these problems by radically restricting such jurisdiction, thus effectuating a policy of non-interference in state fiscal operations.

**A. Congressional Intent To Limit Jurisdiction**

Despite the contentions of Petitioners that Congress only sought to prevent the granting of injunctions by federal courts in state tax disputes, the history strongly suggests that all jurisdiction of federal district courts over state tax disputes was intended to be removed, except where no "plain, speedy and efficient remedy" was available in state courts.

The Senate report on S1551, which eventually became 28 USC §1341, begins by stating:

> "S1551 amends section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes." Sen.Rep.No. 1035, 75th Cong., 1st Sess. (1937).

Similarly, the House Report begins:

> "The Committee on the Judiciary, to whom was referred the bill (S1551) to amend section 24 of the Judicial Code,

as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes, after consideration, report the same favorably to the House with the recommendation that the bill do pass." H.R. Rep. no. 1503, 75th Cong., 1st Sess. 1 (1937).

These reports indicate that both committees envisioned the Tax Injunction Act as removing from federal jurisdiction all actions which would tend to interfere with the collection of state taxes. The effect which Congress believed the language of the Act would have is stated in the legislative history of the Johnson Act, 48 Stat. 775 (1934) (28 USC 1342), from which Act the language of the Tax Injunction Act was taken. The House Report in opposition to the Johnson Act noted:

"The Johnson bill (S752) seeks to withdraw completely from the district courts of the United States all jurisdiction in suits relating to orders of State administrative boards or commission affecting rates chargeable by public utilities." H.R. Rep. No. 1194, 73rd Cong., 2d Sess. 1 (1934).

An even stronger indication that Congress was hostile to federal court jurisdiction over state tax disputes, and that Congress believed the proper forum for such disputes was in the state courts is contained in the following remarks of Senator Bone, the sponsor of the Act, which remarks quote from the Senate report on the Johnson Act, Sen. Rep. 125, 73rd Cong., 1st Sess. (1934):

"The following quotations from the same report are also thought to be applicable to this bill in the same manner that they were applicable to the Johnson bill:

* * *

When a State question arises under a State statute, why not let the courts of that State settle that controversy, whether the controversy is between citizens of one State or citizens

> of two different States? Why not be logical and let the State courts try controversies arising under State laws within their borders instead of permitting a few privileged persons who do business in a State to take their controversies into Federal courts and thus burden Federal judges with the settlement of State questions and the control of lawsuits arising entirely and solely out of controversies under State laws?" 81 Cong. Rec. 1415, 1416-1417 (Feb. 19, 1937).

It is apparent that Congress believed that state tax disputes could and should be properly settled in state courts. This concern would not be remedied if Congress intended the Act to apply only to injunctive actions, as Petitioners insist.

Congress did not intend to limit the exercise of federal rights even though federal jurisdiction over state tax disputes was eliminated. The Senate Report states:

> "It should be emphasized that the bill does not take away any equitable right of the taxpayer or deprive him of his day in court. Specific provision is made that the suit will not be withdrawn from the jurisdiction of the Federal district court except where there is a plain, speedy and efficient remedy at law or in equity in the courts of the State. A full hearing and judicial determination of the controversy is assured. An appeal to the Supreme Court of the United States is available as in other cases." Sen.Rep. 1035, 75th Cong., 1st Sess. 2 (1937).

Senator Bone also noted:

> "While there are many other parts of the committee's report on the Johnson Act which are well worth rereading in connection with the consideration of the proposed legislation, there is presented here only one additional quotation, which deals with the constitutional power of the Congress to enact legislation of this type: 'The object of

> the legislation, as it has been distinctly stated, is to take away jurisdiction from the district courts of the United States. It is not intended to take away and does not take away any jurisdiction of the Supreme Court of the United States." 81 Cong. Rec. 1415, 1417 (Feb. 19, 1937).

It is clear that Congress intended state tax disputes to be resolved solely in the state court systems (unless proper remedies were not available in those systems). To accomplish this purpose, it was within the contemplation of Congress to remove jurisdiction of the federal courts over all state tax disputes.

Petitioners, however, make much of the fact that the legislative history of the Tax Injunction Act speaks primarily, if not exclusively, of preventing injunctive actions, and they thus conclude that only suits for injunctions were barred by the Act. If the legislative history speaks exclusively in terms of injuctive actions with reference to federal court interference in state taxation matters, it is not without reason. Prior to the passing of the Act in 1937, there was a total absence of damage suits or declaratory judgment actions to contest the validity of state or local taxes in federal court.[2] Damage suits under §1983 were non-existent at the time of passage and it seems likely that Congress never considered the possibility of either declaratory judgment or damage actions in this context.[3] It was not until 1938,

---

[2] See Note, *The Tax Injunction Act and Monetary Relief*, 46 U. of Chi. L. Rev. 736, 745 n. 44 (1979).

[3] See Note, *A Federal Forum for Broad Constitutional Deprivation by Property Tax Assessment*, 65 Cal. L. Rev. 823, 833-834 (1977).

one year after passage of §1341, that federal courts began the expansion of substantive and remedial rights under §1983.[4] Damage actions under §1983 against municipalities have not been expanded until most recent times.[5]

Given this legal/historical context, it is likely that Congress believed that it was barring all suits which might be brought against taxing bodies or officials. This conclusion is further supported by a comment in the legislative history of the Johnson Act, concerning a similar effect of that legislation. Senator Austin, during the debates over the Johnson Act, stated:

> "The sole method of enforcing the Bill of Rights authorized by law and adopted by the Federal courts in most cases is by way of injunction; and yet that is the instrument that we are trying to take away from these courts, not in general, not with respect to all men, but with respect to a certain class of men, discriminating against them to their very great damage." 78 Cong.Rec. 2021 (Feb. 6, 1934).

The congressional intent to effectuate a policy of non-interference by federal courts in state fiscal affairs should not be frustrated by a narrow reading of the legislative history of the Act. The potentiality of actions against state taxing bodies or officials other than actions for injunctive relief effectively developed after passage of the Act; congressional preoccupation with the only form of action it believed possible should not be used to thwart its intent to remove completely all jurisdiction over state tax disputes and issues from federal district courts.

---

[4] The Court in *Hague* v. *CIO*, 307 U.S. 496 (1939), first defined what was meant by "rights, privileges or immunities secured by the constitution and laws" as found in the Civil Rights Act of 1871 (42 USC §1983). Afterwards, lower federal courts began to entertain claims of infringement for a wide variety of property and personal rights. See Comment, *The Civil Rights Acts and Mr. Monroe*, 49 Cal. L. Rev. 145, 147, 169 (1961).

[5] *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1977).

Thus, the intent of Congress was focused on the numerous problems arising from federal court jurisdiction over state tax disputes. Congress attempted to resolve these problems by eliminating that jurisdiction and by restricting the resolution of state tax disputes to state courts. Clearly, Congress intended to establish a policy of non-interference by federal district courts in state tax issues and fiscal affairs with the purpose of preserving to the states this area of prime importance. *United Gas Pipeline Co.* v. *Whitman*, 595 F.2d 323 (5th Cir. 1979); *Matthews* v. *Rodgers, supra*, 525. *Tully* v. *Griffin, Inc., supra*, 73.

**IV The Weight Of Judicial Authority Has Interpreted The Tax Injunction Act As A Bar To Petitioners' Action For Damages.**

Examination of circuit and district court decisions with regard to the applicability of the Tax Injunction Act is instructive.

The overwhelming weight of judicial authority which has interpreted the Tax Injunction Act has found that the Act bars declaratory judgment, damage actions, and hybrid damage actions (refund suits). The few courts which have deviated from this posture have construed the Act very narrowly and

disregarded the purpose and intent of the Act.[6] The misinterpretation of the Tax Injunction Act is most apparent in *Fulton Market Cold Storage Co.* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978) *cert. denied* 439 U.S. 1171 (1979), and will be explored, *infra.*

It is convenient to analyze the lower court decisions in terms of the action brought.

A. *Declaratory Judgment*

Federal courts have consistently held that the Tax Injunction Act bars declaratory relief. *Coon* v. *Teasdale,* 567 F.2d 820 (8th Cir. 1977); *Ludwin* v. *City of Cambridge,* 592 F.2d 606 (1st Cir. 1979); *Aluminum Company of America* v.*Department of the Treasury of the State of Michigan,* 522 F.2d 1120 (6th Cir. 1975); *Ford Motor Credit Company* v. *Louisiana Tax Commission,* 440 F.2d 675 (5th Cir. 1971); *Green* v. *Klinkofe,* 422 F.Supp. 1021 (N.D. Ind. 1976); *Fulton Market Cold Storage Co.* v. *Cullerton, supra.*

The basis for extending the bar to declaratory actions is best expressed by the court in *Ludwin* v. *City of Cambridge,* 529 F.2d 606, 608-609 (1st Cir. 1979):

---

[6]Only three cases can arguably support Petitioners' position that the Tax Injunction Act does not bar damage actions: *Southland Mall, Inc.* v. *Garner,* 293 F.Supp. 1370 (W.D. Tenn. 1968); *Louisville & Nashville Railroad Co.* v. *Atkins,* 390 F.Supp. 576 (M.D. Tenn.); *Fulton Market Cold Storage Co.* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978) *cert. denied* 439 U.S. 1171 (1979). In the other cases cited by Petitioners, either the Tax Injunction Act was not raised as a bar to the "damage" action *(Ott* v. *Mississippi Valley Barge Lines,* 336 U.S. 169 (1948); *Rico Argentine Mining Co.* v. *Board of County Commissioners,* 215 F.Supp. 208 (D. Col. 1963)) or a later case rejected the decision (*Central Steel & Wire Co.* v. *City of Detroit,* 99 F.Supp. 639 (E.D. Mich. 1951) rejected by same court in *Kistner* v. *Milliken,* 432 F.Supp. 1001 (E.D. Mich. 1977)).

> ". . . plaintiff's declaratory action as well as his damage claim is predicated upon the invalidity of the assessment itself and is, in essence, an attack upon the tax assessment. Thus, the federal policy of non-interference with a state's collection of its revenue except where an asserted federal right might otherwise be lost governs the disposition of this declaratory action. (citations omitted) This policy is applicable even where, as here, the complaint is based on 42 USC §1983. (citations omitted) Federal courts must, therefore, abstain unless adequate state procedures do not exist for raising plaintiff's federal claims."

Petitioners' contention that the court in *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293 (1943), previously considered this issue and refused to extend the bar to declaratory actions, is clearly a misreading of *Great Lakes.* In that case the court found it "unnecessary to inquire whether the words of the statute may be so construed. . ." and instead relied on traditional principles of federal equity jurisdiction. The thrust of the court's opinion was to make clear that Acts such as the Tax Injunction Act, the Federal Declaratory Judgment Act (Act of June 14, 1934 48 Stat. 955) and the Act of August 30, 1935, 49 Stat. 1027, all mentioned in the decision, did not in any way restrict the court's equity powers, or the freedom to withhold equitable relief in cases outside of the specific statutory bars. *Great Lakes* is better interpreted as a reassertion of the federal court's equity jurisdiction which had been considerably restricted by Congress, than, as contended by Petitioners, as a refusal to construe the language of the Tax Injunction Act to bar declaratory relief. See *Great Lakes,* at 301.

**B. Actions for Tax Refunds**

Actions in which taxpayers have prayed for a "refund" of taxes allegedly overpaid as a result of the invalidity of the tax assessed, are damage actions. It is hornbook law that the word "damages" is equated with the injury resulting from the direct

and proximate actions of the wrongdoer. *Pennsylvania R. Co.* v. *International Coal Min. Co.*, 230 U.S. 184 (1912) J. Pitney dissenting at 213.

As noted by Petitioners in Point IV of their Brief, the district court in *Fair Assessment in Real Estate Association Inc.*, v. *McNary*, 478 F.Supp. 1231 (E.D.Mo. 1979), *aff'd.* 622 F.2d 415 (8th Cir. 1980) Pet.App., A-7, characterized individual Petitioners' action as that of a suit for refund. Based on the damages pled by individual Petitioners, this is, in fact, their only alleged injury excluding their claim for punitive damages. There are no other elements of damage, as Petitioners imply in their brief, under their cause of action premised in §1983. As was extensively discussed by Justice Pitney, dissenting in *Pennsylvania R. Co.* v. *International Coal Min. Co., supra,* at 213, in reference to discriminatory shipping rates imposed upon the plaintiff therein:

> "The word 'damages', according to its customary usage, is at least as properly applicable to the immediate and direct result of imposing higher charges upon one shipper than are customarily charged under similar circumstances and for a like service to other shippers, as it is to the ultimate consequences of such discrimination."

Thus, judicial determination of "refund actions" is dispositive of Petitioners' "damage action".

The district court, in reaching the determination that Petitioners' action was barred by §1341, relied on the well reasoned opinions in *Kelly* v. *Springet*, 527 F.2d 1090 (9th Cir. 1975) and *Bland* v. *McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 977 (1973), both "refund actions". The court in *Bland* v. *McHann, supra,* cited all of the considerations heretofore discussed which are encompassed in the purpose and intent of the Tax Injunction Act.

> "We are convinced that both long-standing judicial policy and congressional restriction of federal jurisdiction in